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Public Prosecutor v Kalidass a/l Ramaya

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HIGH COURT (IPOH) — CRIMINAL TRIAL NO 45A-2–04 OF 2016
SM KOMATHY JC
10 NOVEMBER 2016

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Criminal Law — Dangerous drugs — Trafficking — Accused charged for trafficking in heroin and monoacetymorphines under s 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39B(2) of the same Act — Whether prima facie case proven — Whether there was break in chain of evidence — Whether there was doubt of identity of drug exhibits — Dangerous Drugs Act 1952 s 39B(1)(a) & (2)

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The accused was charged with the offence of trafficking heroin and monoacetymorphines under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') punishable under s 39B(2) of the same Act. ASP Mohamad Sharmizi ('SP4') led a party of six police personnel, to a dwelling house ('the house'). Two cars were parked in the front porch of the house. SP4 and his men broke open the front grill and arrested the accused in the kitchen. After a body search, a bunch of keys was recovered from his right pocket. SP4 also recovered a red plastic bag from the kitchen table. The bag contained a black plastic bag where inside it contained 15 clear plastic packets containing substances suspected to be drugs, 20 small black plastic bags, a weighing scale, a small spoon and other items. Also found in the kitchen was a pink plastic bag in which there was a brown box which contained a pistol and ammunition. The whole house was searched and there was no one else in the house. All items were seized and the accused was brought to the Ipoh District Station. SP4 lodged a police report, issued a search list to the accused person and marked all exhibits by signing and dating them. The exhibits were then handed to the investigating officer ('SP5'). The accused argued that the prosecution had failed to establish a prima facie case on the basis: (a) SP4 was not a reliable and credible witness; (b) evidence was claimed to be found by SP4 but the search list prepared by him did not corroborate; (c) SP4's evidence was inconsistent with SP5's; (d) there was a break in the chain of evidence as SP4 left the drugs found by him with one of his men, of which he could not identify; and (e) SP4's inability to confirm that the drugs were not tampered with in his absence.

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Held, acquitting and discharging the accused:

(1) There was doubt as to the identity of the drugs exhibits as SP4 had admitted he left the evidence with a police officer, which he could not recall who. The question arose of what happened to the drugs during the

period SP4 was away and whether the unidentified police officer handed over the same exhibits to SP4 when he returned to the house. It was clear that there was a break in the chain of evidence. The prosecution bore the burden of proving beyond a reasonable doubt that there was no breaks in the chain of evidence with regard to the handling of the drug exhibits from the time they were seized to the time they were sent to the chemist and subsequently produced in court (see para 25).

[Bahasa Malaysia summary

Tertuduh telah dituduh atas kesalahan pengedar dadah heroin dan monoacetymorphines di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang boleh dihukum di bawah s 39B(2) Akta tersebut. ASP Mohamad Sharmizi ('SP4') mengetuai sepasukan enam anggota polis, ke sebuah rumah kediaman ('rumah tersebut'). Dua kereta terletak di anjung hadapan rumah tersebut. SP4 dan pasukannya memecah buka gril hadapan dan menangkap tertuduh di dapur. Selepas pemeriksaan badan, segugus kunci ditemui dari poket kanannya. SP4 juga menemui beg plastik merah dari meja dapur. Beg itu mengandungi beg plastik hitam yang mana di dalamnya mengandungi 15 paket plastik lutsinar yang mengandungi bahan yang disyaki dadah, 20 beg plastik hitam yang kecil, satu alat timbang berat, satu sudu kecil dan barang lain. Juga ditemui di dapur adalah beg plastik merah jambu di mana terdapat satu kotak coklat yang mengandungi pistol dan peluru. Keseluruhan rumah tersebut telah diperiksa dan didapati tiada orang lain di rumah tersebut. Kesemua barang yang dirampas dan tertuduh telah dibawa ke Balai Daerah Ipoh. SP4 membuat laporan polis, mengeluarkan senarai carian kepada tertuduh dan menandakan semua ekshibit dengan menandatangan dan meletakkan tarikh kepadanya. Ekshibit-ekshibit kemudian diserahkan kepada pegawai penyiasat ('SP5'). Tertuduh berhujah bahawa pendakwaan telah gagal membuktikan kes prima facie berdasarkan: (a) SP4 bukan saksi yang berwibawa dan boleh dipercayai; (b) keterangan didakwa telah ditemui oleh SP4 tetapi senarai carian yang disediakan olehnya tidak menyokong; (c) keterangan SP4 tidak konsisten dengan keterangan SP5; (d) terdapat lompang dalam rantaian keterangan kerana SP4 meninggalkan dadah yang ditemuinya dengan salah satu daripada anggota pasukannya, yang mana dia tidak dapat dikenal pasti; dan (e) ketidakupayaan SP4 untuk mengesahkan bahawa dadah tersebut tidak diusik semasa ketiadaannya.

Diputuskan, melepas dan membebaskan tertuduh:

(1) Wujud keraguan berhubung identiti ekshibit-ekshibit dadah itu kerana SP4 mengaku telah meninggalkan bukti itu dengan seorang pegawai polis, yang dia tidak ingat siapa. Persoalan timbul tentang apa yang berlaku kepada dadah tersebut sepanjang tempoh SP4 tiada di situ dan sama ada pegawai polis yang tidak dikenal pasti itu telah menyerahkan ekshibit-ekshibit yang sama kepada SP4 apabila dia kembali ke rumah

tersebut. Ia adalah jelas bahawa terdapat lompang dalam rantaian keterangan. Pendakwaan mempunyai beban untuk membuktikan melampaui keraguan munasabah bahawa tiada lompang dalam rantaian keterangan berkeaan pengendalian ekshibit-ekshibit dadah tersebut dari masa dadah tersebut dirampas sehingga masa ia dihantar kepada ahli kimia dan kemudian dikemukakan di mahkamah (lihat perenggan 25).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 815–975.

Cases referred to

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314, SC (refd)
Teoh Hoe Chye v PP; Yeap Teong Tean v PP [1987] 1 MLJ 220, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)

Charan Singh (Jagdave Singh with him) (Nurul & Charan) for the accused.
Harris Ong bin Mohd Jeffrey Ong (Deputy Public Prosecutor, Attorney General's Chambers) for the public prosecutor.

SM Komathy JC:

[1] The accused, Kalidass a/l Ramaya, was prosecuted before me on the following charge:

Bahawa kamu, pada 7 Mei 2015 jam lebih kurang 4.40 petang di rumah no 49, Jalan Rishah Indah 1, Desa Rishah, 30100 Ipoh, Perak Darul Ridzuan, telah mengedar dadah berbahaya sejumlah berat 433.3 gram (291.8 gram Heroin dan 151.5 gram monoacetymorphines), dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum dibawah Seksyen 39B(2) Akta yang sama.

[2] The prosecution called five witnesses to prove the charge against the accused.

[3] According to the evidence led by the prosecution, ASP Mohamad Sharmizi bin Mohamad Noor ('ASP Mohamad Sharmizi') ('SP4'), after attending a briefing in connection with the theft of cars at the Ipoh District Police Station, led a party of six police personnel, consisting of Sjn Yahaya bin Hanafiah, Mohd Faizal bin Bahari, Fazly bin Salim, Timothy Jathan ak Kenedy, Faizul bin Abu Bakar and Sjn Azhar, to a dwelling house ('the house'), known as No 49 Jalan Rishah Indah 1, Desa Rishah Ipoh, Perak. It was a interlink double-storey terrace house. They arrived there at about 4.40pm. Two

cars were parked in the front porch of the house.

[4] According to ASP Mohamad Sharmizi, the gate of the house was ajar. He and his men entered the compound and, whilst looking around noticed the shadow of a person inside the house through the glass sliding door of the house. He tried to open the front grill but it was locked, whereupon his men broke open the front grill door and wooden door to gain access into the house.

[5] On entering the house he saw the accused in the kitchen and arrested him. The accused was searched and a bunch of keys was recovered from his right trouser pocket. ASP Mohamad Sharmizi also recovered a red plastic bag on the kitchen. He opened the bag and found a black plastic bag inside in which there were 15 clear plastic packets containing substances that was suspected to be drugs and 20 small black plastic bags. Clear plastic packets were found inside these 20 small black plastic bags. In the black bag, there was also a weighing scale, a small plastic spoon and other items. He also found a pink plastic bag in the kitchen in which was a brown box which contained a pistol and ammunition.

[6] The whole house was searched. Apart from the accused there was no one else in the house. ASP Mohamad Sharmizi then contacted the State Deputy Police Chief ACP Annuar bin Othman ('ACP Annuar'), for further directions. All the items were seized and the accused person was brought to the Ipoh District Police Station. There ASP Mohamad Sharmizi lodged a police report and issued a search list to the accused person. He marked the exhibits by putting his signature and date on them. The exhibits were then handed to the investigating officer ('SP5'), ASP Mohd Syukry bin Mohd Ali.

[7] Cross-examination of ASP Mohamad Sharmizi was aimed at establishing:

(a) that the raid was conducted by Sjn Yahaya with three others and not ASP Mohamad Sharmizi;

(b) that ASP Mohamad Sharmizi, ACP Annuar and other officers had arrived at the house after the items had been recovered by Sjn Yahaya in the kitchen;

(c) that the accused was not arrested inside the house. Sargeant Yahaya arrested the accused when the latter alighted from his car which he had stopped in front of the house to check why the gate was open;

(d) that Sjn Yahaya and his men broke the front grill and wooden door after the accused informed him that he did not have the house keys; and

(e) that there were material discrepancies between his evidence and the search list prepared by him. The search list, contrary to his evidence,

mentioned that the items in the house were recovered by ACP Annuar, ASP Sharmizi, Insp Jalizulham and Insp Wisan. A

[8] ASP Mohamad Sharmizi was then further cross-examined as to whether the accused was taken anywhere after his arrest. He answered he could not remember. When asked if he was at the house with the accused at all material times, he answered in the affirmative stating that he was busy marking the items recovered from the house. He further said that he did not know what the other officers was doing at the material time. B

[9] When pressed further, ASP Mohamad Sharmizi acknowledged that after the arrest accused was taken to his house and his mother's house at No 32 and No 48, respectively, in the same vicinity. He further acknowledged that he had accompanied the narcotics team that had arrived at the house after the drugs were recovered to carry out a search of the accused's and his mother's house. He also acknowledged that when the accused was taken out, he had requested one of his men to look after the drug exhibits. He could not remember who he had left the exhibits with or the length of time he was away from the house. Neither could ASP Mohamad Sharmizi recall who had returned the said exhibits to him when he returned to the house. He also accepted candidly that he was unable to verify that the items were not tampered with. C D E

[10] In re-examination, ASP Mohamad Sharmizi was asked to explain why he had given two different versions as regards whether the accused was taken out of the house after his arrest and the custody of the items recovered at the house. It was pointed out to him that in examination-in-chief he had claimed that he had never left the house and the items were under his custody at all material times but in cross-examination had admitted that he had left the items under the care of one of his men when he left the house. He explained that he had to leave with one of his men as he was instructed by Supt Anuar to search the accused's residential house at No 32. F G

[11] Returning to the narrative, the drug exhibits were sent by the investigating officer for analysis to Dr Silveraji a/l Samiveloo ('SP1'), a government chemist. Upon analysis Dr Silveraji confirmed it contained 291.8g of heroin and 151.5g of monoacetymorphines. H

[12] Evidence was also led through the accused's wife, Ammu Sarinah Mohanjis ('SP3') that the house was purchased by the accused a few years ago for his daughter. SP3 testified that the house was not occupied by anyone at the material time. She and the accused resided at No 32 and the house in which the drugs were found was used to store items from the mini market business that she operated. I

A THE ARGUMENTS

[13] Counsel for the accused, Mr Charan Singh argued that the prosecution had failed to establish a prima facie case. It was pointed out that the only witness relied on by the prosecution to prove that the accused had possession of the drugs was ASP Mohamad Sharmizi. ASP Mohamad Sharmizi was not a reliable and credible witness. His evidence was full of contradictions and discrepancies. He had lied brazenly under oath in examination-in-chief without no regard for the truth. He had lied in his answers, among others in respect of the items recovered from the house. He had claimed that at all material times he had custody of the items. His lack of basic honesty and propensity to lie or mislead the court did not instil any confidence to accept his evidence that the accused had possession of the drugs.

[14] Counsel went on to point out the other weaknesses in ASP Mohamad Sharmizi's testimony. Firstly, ASP Mohamad Sharmizi in his evidence had said that he headed the raiding team consisting of six police personnel, but this was inconsistent with his police report ('P23') in which he had stated:

> Pada 7.5.2015 jam lebih kurang 1640hrs, saya bersama sepasukan polis dari IPD Ipoh dengan diketuai oleh SUP G/10560 Anuar bin Othman dan disertai Insp G/16472 Jalizulham bin Abdullah, Insp G/19887 Wisan a/l Eh Pot serta anggota terdiri daripada Sjn ... telah pergi ke rumah No. 49 ...

[15] Secondly, in his evidence he had claimed that the items in the house were found by him and the six police personnel who were with him, but the search list ('P24') prepared by him did not corroborate him. On the contrary, the search list stated that the items were 'dijumpai oleh' Supt Annuar, ASP Sharmizi, Insp Jalizulham and Insp Wisan. No reasonable explanation was advanced for the contradiction.

[16] Thirdly, ASP Mohamad Sharmizi's evidence was inconsistent with the evidence of the investigating officer. According to the investigating officer, ASP Mohamad Sharmizi had informed him in the course of his investigation that he (ASP Mohamad Sharmizi) had gone to the house with all the officers mentioned in his police report at 4.40pm on 5 July 2015 and that the search was conducted in the presence of these officers as stated in the search list. The question arises, counsel argued, was ASP Mohamad Sharmizi actually present when the drugs were first recovered in the house, or did he come there later after the arrest of the accused.

[17] To bolster his argument, counsel drew my attention to the often cited case of *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631. There the the Federal Court made the following pertinent observation at para 22 in relation to the effect of a previous or prior inconsistent statement

made by a witness:

> The second evidential point is this. PW3 confirmed under cross-examination that PW8 had informed her that earlier on the day of the appellant's arrest, at about 4am, drugs had been recovered from house No 52 and that eight persons had been arrested in connection with that raid. The public prosecutor relies on the testimony of PW8 who in his evidence denied that such a recovery or arrest had taken place. But this overlooks the real issue. At issue was PW8's credibility. He did not in his evidence deny that he had told PW3 about the 4am raid and arrests. The fact remains that PW8 had made a previous statement to PW3 which was inconsistent with his evidence in court. This, at the very least, had the effect of rendering his evidence suspect. It most certainly required the trier of fact to approach that evidence with caution. As Ali J (later Ag LP) said in *Mohamed bin Kasdi v Public Prosecutor* [1969] 1 MLJ 135; [1968] 1 LNS 78:
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> > No hard and fast rule can be laid down for determining the credibility or otherwise of a witness, but when a witness gives or makes two statements which differ in material particulars there must necessarily be ground for believing that he is not a truthful witness.

[18] Next, and most crucially, counsel argued vigorously, the admission by ASP Mohamad Sharmizi that the drugs found at the house were left by him with one of his men whom he could not identify was critical. Neither could he recall how long it was with this person. These facts demonstrated that there was a break in the chain of evidence that the drugs produced in court were the drugs recovered from the house.

[19] It was lastly argued that ASP Mohamad Sharmizi's inability to confirm that the drugs had not been tampered with in his absence further weakened the prosecution case. In a drug trial, it is incumbent on the prosecution to prove that the drugs recovered from the house were the drugs produced in court and that it had not been tampered with. This, counsel argued, the prosecution had failed to do so.

[20] In this regard, counsel referred to the case of *Shamsuddin bin Hassan & Anor v Public Prosecutor* [1991] 3 MLJ 314. In that case, Harun Hashim SCJ held 'there was no explanation what PW4 did with the drugs for more than five hours before he handed it over to the investigating officer. We are of the view that these are serious gaps in the chain of evidence with regard to the drugs thrown out of the car and the exhibits produced in court. On this ground alone, the appellant should not have been called upon to enter their defence'.

[21] In the alternative, counsel argued that even if his principal argument that ASP Mohamad Sharmizi's evidence ought to be rejected was not accepted, ASP Mohamad Sharmizi's propensity to lie when it suits his purposes clearly demonstrated that his evidence should not be accepted without credible

corroborative evidence. In this case, there was not an iota of evidence to provide any corroboration of the matters testified by ASP Mohamad Sharmizi. It was pointed out that it had been put to ASP Mohamad Sharmizi that it was Sjn Yahaya who had arrested the accused and that the arrest was made outside the house. It was further put to him that the drugs were found and seized by Sjn Yahaya and that he had only come to the house later with another team of officers. Despite this Sjn Yahaya was not called as a witness to corroborate his testimony.

[22] The learned deputy public prosecutor candidly conceded that in view of ASP Mohamad Sharmizi numerous admissions made in cross-examination and his inability to confirm that the drugs were not tampered with during the period he was out of the house, made it difficult for him, as an officer of the court, to contend that was no break in the chain of evidence.

[23] It is trite that in drug cases where a break in the chain of evidence is alleged, this essentially means the defence is contending that the drugs analysed by the police chemist and forming the basis of the charge against the accused are not the same drugs that were seized from the accused's possession. In *Teoh Hoe Chye v Public Prosecutor; Yeap Teong Tean v Public Prosecutor* [1987] 1 MLJ 220, the Supreme Court explained at p 229 when a break in the chain of evidence occurs:

> A number of grounds were raised in this appeal, the principal argument was that the learned trial judge had erred in law in not concluding that the non-calling of Supt Lum, the Investigating Officer, was fatal to the prosecution case. Further, that the learned judge had erred in not concluding that there was a break in the chain of evidence relating to the exhibits.
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> Fundamentally, the matter in issue is not whether there was a failure to call or not to call the investigating officer but whether the failure to call a particular witness gave rise to a serious gap in the prosecution case.
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> In the instant case, Supt Low testified to the effect that he handed over the exhibits at his office to Supt Lum, the Investigating officer, at about 5.20pm. He apparently left the office to return only at about 7.20pm, some 2 hours 20 minutes later, with the chemist who carried out an initial test to determine whether the exhibits seized were in fact drugs. Supt Low said that the chemist did confirm they were drugs. However the chemist himself did not testify to that effect. But what is more crucial is how and in what manner the exhibits came back to Supt Low's custody. There was no evidence adduced by the prosecution to show exactly what had happened to the exhibits between the time of handing over by Supt Low to Supt Lum and the subsequent examination by the chemist.
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> The following questions may be asked: what did Supt Lum do with the exhibits after he received them from Supt Low; where did he keep them; were they kept under lock and key; and did Supt Lum return to Supt Low the very same exhibits he received from Supt Low. The answers to these questions are highly pertinent to a proper determination of the identity of the exhibits.

A very vital link in the prosecution case seems to be missing. The point was, in our view, rightly taken by counsel for both the appellants when they contended that there was a serious break in the chain of evidence affecting proof as to the identity of the exhibits. It is a question of proof whether in fact the exhibits produced were the exhibits that were seized, handed over to Supt Lum and returned by him to Supt Low and then kept by the latter under lock and key until they were produced in court.

As it was clear that Supt Lum was given custody of the exhibits soon after the arrest of the appellants, it is reasonable to assume that police statements would have been taken from him and that he would ordinarily have been called to give evidence. He was however not called. Nevertheless, the decision whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution (*Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16). Insofar as the trial court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi*'s case).

We would observe at this point that the law is clear in that 'it is unnecessary to call evidence to ensure there is no break in the chain of evidence' (*Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75). But where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. In the instant case there was such a failure.

Supt Lum would clearly have been able to provide the missing link in the chain of evidence if he had been called to give evidence for the prosecution. For some unknown reasons he was not called. In our view, it was clear that in the particular circumstances of this case, the failure to call this witness had caused a serious break in the chain of evidence relating to the identity of the exhibits.

The break was so serious that we do not think there is any statutory cure. We would add that any attempt in such a case to apply the provisions of s 60(1) of the Courts of Judicature Act 1964, would amount to a relaxation of the law of criminal procedure to such an extent as to deprive an accused person of his right. In this regard, it behoves us to reiterate that 'the requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else and therefore the appeal must be allowed and the conviction quashed' (*Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116).

In the circumstances of this case, it is our considered view that the appeal of the two appellants should be allowed and their conviction set aside and be substituted by an acquittal and discharge.

[24] It is clear from the foregoing passage that where doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution's case.

[25] In the present case, there is a doubt as to the identity of the drug exhibits in the light of the admission made by ASP Mohamad Sharmizi that he had left it with a police officer. He could not even recall who it was. The question arises what happened to the drug exhibits during the period ASP Mohamad Sharmizi was away. Did this police officer hand over the very same exhibits to ASP Mohamad Sharmizi when he returned to the house. It is clear that there was a break in the chain of evidence that occurred when ASP Mohamad Sharmizi left the house to conduct a search of the accused house. The prosecution bears the burden of proving beyond a reasonable doubt that there are no breaks in the chain of evidence with regard to the handling of the drug exhibits from the time they are seized to the time when they are sent to the chemist and subsequently produced in court.

CONCLUSION

[26] For these reasons, I find that the prosecution has failed to establish a prima facie case and the accused is acquitted and discharged of the charge.

Accused acquitted and discharged.

Reported by Nisha Paran